

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 929 of 1995

For Approval and Signature:

Hon'ble MR.JUSTICE D.G.KARIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

AFAQ GULAMNABI SHAIKH

Versus

STATE OF GUJARAT

Appearance:

MR KJ SHETHNA Advocate for Petitioners

MR SR DIVETIYA APP for Respondent No. 1

MR G RAMAKRISHNAN Advocate for Respondent No. 2

CORAM : MR.JUSTICE D.G.KARIA

Date of decision: 16/03/96

ORAL JUDGEMENT

This appeal is directed against the judgment and order of conviction dt. September 6, 1995 rendered in Sessions Case No. 114 of 1994 on the file of the learned Additional Sessions Judge, Baroda. The learned Additional Sessions Judge, by the impugned judgment held both the appellants accused guilty for the offence under sections 376- 506(2) read with section 114 of Indian Penal Code, and convicted both of them. The appellant

no.1 was sentenced to R.I. for seven years and fine of Rs.5,000/- in default R.I. for one year for the offence under section 376 of Indian Penal Code. The appellant no.2 was sentenced to undergo R.I. for seven years and fine of Rs.2,000/-, in default, R.I. for six months for the offence under section 376 read with section 114 of Indian Penal Code. Both the appellants were sentenced to undergo R.I. for one year each for the offence under section 506(2) read with section 114 of Indian Penal Code. The sentences are ordered to run concurrently.

According to case of the prosecution, at about 9-30 P.M. on October 21, 1992, P.W.1 Kureshabanu, when she was going to Momin Park Society to call her younger brother Mahmad Kasim, was intercepted by both the accused and took her forcibly at the point of knife near Gujarat Tractor Colony where new buildings were under construction. The accused no.2 showed knife to her and threatened her not to raise any shout. He also gave threat that unless she succumbed to accused no.1, he would cause injury to her by the knife. The accused no.1 made P.W.1 to lai down on the ground and committed rape on her after removing her Salwar. It is alleged that accused no.2 was standing near the gate at that time. Thereafter both the accused had left the place. P.W.1 felt giddiness as there was bleeding from her private part. Instead of going to call her brother, she then returned to her home, after sitting there for sometime. The clothes which she had put on, had become blood stained on account of the rape by accused no.1.

P.W.1, after reaching home did not inform any one about the incident. She slept as she felt giddiness. On the next day, she was weeping and on inquiry by her mother P.W.2 Mariambibi, P.W.1 told her about the incident of the previous night. P.W.2 Mariambibi thereupon told the mother of accused no.2 who is residing opposite to the house of P.W.2 and asked her as to why the accused persons had behaved in that manner.

On October 24, 1992, P.W.1 prosecutrix Kureshabanu and her brother Salim lodged the F.I.R. Ex.11 at Juna Padra Road Police Station. After investigation, both the accused persons were chargesheeted for the aforesaid offences.

Charge Ex.3 was framed against both the accused persons for the offence under sections. 376- 506(2) read with section 114 of Indian Penal Code to which both the accused persons pleaded not guilty.

In the statement recorded under section 313 of the Code of Criminal Procedure, the accused persons stated that they were falsely implicated.

The learned Additional Sessions Judge, after having recorded the evidence of the prosecution witnesses and on appreciation thereof, found both the accused persons guilty and convicted and sentenced them as aforesaid.

Before I deal with the merits of the case and the submissions of the learned advocate Mr. K.J.Shethna for the appellants, it may be mentioned that during pendency of the appeal, the accused no.1 showed his willingness to marry P.W.1 Kureshabanu. P.W.1 was also ready and willing to marry with accused no.1. In order to ascertain genuineness of the offer of accused no.1, a condition to deposit Rs.60,000/- was imposed. Accordingly accused no.1 had deposited Rs.60,000/- on 20th February 1996 in this court. Thereafter, accused no.1 was released on temporary for the purpose of solemnising his marriage with P.W.1. It is stated at the bar that P.W.1 and accused no.1 have now lawfully married and are happily residing together.

Mr.Shethan, learned advocate appearing for the appellants, has taken me through the relevant evidence on record and also relevant part of the impugned judgment. It is contended that having regard to the evidence of P.W.1 prosecutrix Kureshabanu at Ex.10 and that of the medical evidence of P.W.6 Vaishakhiben Dave at Ex.20, the story advanced by the prosecutrix is inherently improbable. Incident is said to have taken place on October 21, 1992, whereas F.I.R. was lodged on 24th i.e. after three days of the occurrence. It is in the evidence that yet Juna Padra Police Chowky is situated nearby residence of the prosecutrix and yet she did not report the matter to the said Police Chowky. Mr.Shethna further pointed out material omission in the F.I.R. and in the evidence of P.W.1. In the submission of Mr.Shethna, the conviction cannot be sustained on the basis of the evidence on record.

I have heard Mr.S.R.Divetiya, learned APP appearing for the respondent- State. The prosecutrix P.W1 is also impleaded as party in this appeal and she is being represented by Advocate Shri G.Ramchandran.

In these facts and circumstances of the case and particularly in view of the aforesaid changed circumstances of lawful marriage between P.W.1

Kureshabanu and accused no.1, I am of the view that the contentions raised by Mr. Shethna need not be dealt with in detail. It is also not necessary to examine the view taken by the learned Additional Sessions Judge convicting both the accused persons.

In view of the aforesaid changed circumstances, Mr. Shethna, learned counsel appearing for the appellants, has mainly concentrated and confined on the point of sentence. It is urged that they are special and adequate reasons to impose sentence of imprisonment for a term of less than seven years, as provided in Sec. 376 of I.P.Code. He submits that the substantive sentence imposed on the appellants be reduced to which they have undergone so far and a fine may be increased and substantial part thereof be ordered to be paid to the prosecutrix for the ends of justice. I see substance in the submission of Mr. Shethna, particularly when accused no.1 has now married with P.W.1 Kureshabanu, they have thus become lawful married couple. In view of this special circumstances, matter on the point of sentence could be reviewed leniently. The decision of this court in the case of Himat Popatlal Raval Vs. State of Gujarat reported in 1983 (3) G.L.H. 264, this court has provided guidelines with regard to sentence in cases of such offences. It is held that the sentence which required to be considered from the view point, in the facts and circumstances of the case, wherein the accused was in a position to influence the girl and take advantage of her inferior position such as that the girl being in service under the accused or the girl being under some obligation of the accused, be considered; the relationship between the accused and the girl and offence is resulting due to making undue advantage of such relationship should be born in mind at the time of considering point of sentence in such offences. Respective ages of the concerned parties would be a material fact and if the prosecutrix being consenting party, and if girl is forcibly or otherwise raped, would be a material aspect to be considered in imposing the sentence.

Considering the said guidelines, I am of the view that there are special circumstances to reduce the sentence. In the instant case, the prosecutrix was aged about 20 years at the time of occurrence and complaint is admittedly lodged three days after the incident. Medical evidence does not support the case of the prosecutrix. Since P.W.1 and accused no.1 have now wilfully and lawfully married. It is stated at the Bar that both the spouses have happy married life. In the changed facts and circumstances, imposing of substantive sentence would

affect married life of newly weds i.e. P.W.1 and accused. It would not be desirable in the facts of the case, to deal with the details of infirmities on the record. Suffice it to say that this is the case to reduce substantive sentence having regard to the facts and circumstances of the case and particularly changed circumstances. So far as accused no.2 is concerned, he is convicted for the offence under section 376 read with section 114 of I.P.Code. He himself has not committed the rape. There is clear case of criminal intimidation under section 506 of I.P.Code for accused no.1.

The appeal is partly allowed. Substantive sentences of R.I. of accused nos.1 and 2 are reduced to that already undergone so far by the appellants. Fine of Rs.65,000/- is imposed on appellant no.1 for the offence under section 376 i/d to undergo R.I. for three and a half years. The amount of Rs.60,000/- deposited by appellant no.1 in this court is ordered to be treated as fine as having been paid by appellant no.1. This amount of Rs.60,000/- shall be in addition to fine of Rs.5,000/- imposed by the trial court. All the amount of fine of Rs.65,000/- is ordered to be paid to the prosecutrix P.W.1 Kureshabanu. The sum of deposit of Rs.60,000/- lying in this court be remitted to the trial court, and be placed in Fixed Deposit in the joint names of Nazir of the trial Court and P.W.1 Kureshabanu.

The appellant no.2 to pay a fine of Rs.17,000/- for the offence under section 376 read with section 114 of I.P.Code in default to undergo R.I. for three and half years. Fine of Rs.5,000/- is also imposed on the appellant no.2 for the offence under section 506(2) of I.P.Code. Total amount of Rs.22,000/- be paid to the prosecutor P.W. 1 Kureshabanu, in default of payment of fine, the appellant no.2 shall undergo R.I. for one and half years. On payment of amount of fine by appellant no.2, the said sum be placed in Fixed Deposit in the joint names of Nazir of the Sessions Court, Baroda and P.W. 1 Kureshabanu. Rs.22,000/- amount of fine include the amount of Rs.2,000/- fine imposed by the trial court.

The learned Sessions Judge, on request of the prosecutrix P.W.1 Kureshabanu and having satisfied himself about genuineness and reasonableness of demand of the prosecutrix P.W. 1 Kureshabanu, may order with regard to payment of deposited amount to her.

The appeal accordingly stands disposed of. Bail bond of appellant no.1- accused no.1 stands cancelled.
